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ABSTRACT

Supreme Court decisions made during the previous and present terms as well as some that will be rendered next term are discussed. Among the cases, the following are of particular relevance to school board members. In "Memphis Community Schools v. Stachura" the Court declared that damages based on the "value" of constitutional rights are not truly compensatory. The Court has agreed to hear, under the Education for All Handicapped Children Act, "Honig v. Doe" on the subject of discipline of handicapped children. In "Meritor Savings Bank v. Vinson" the Court ruled that employers are not always automatically liable for sexual harassment by their supervisory employees. In the case of "Ansonia Board of Education v. Philbrook" the Court ruled that an employer need only offer "a reasonable accommodation" to an employee's religious belief to meet its obligation under Title VII. In "Wygant v. Jackson Board of Education" the Court decreed that societal discrimination alone cannot justify any racial classification adopted by a public employer. School boards are advised to examine any particular race conscious remedial plans they may have, and boards that are contemplating a change in a strict seniority layoff scheme should think twice before so doing. Appended are 53 legal footnotes. (MLF)

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SUPREME COURT UPDATE

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1987 Conference

This was Chief Justice Rehnquist's first year in the center chair of the U.S. Supreme Court and Justice Scalia's first year in the last chair. Some predictable decisions have resulted and some not so predictable. I will review some of these as well as some which were rendered at the end of last year's term and which will be rendered next term.

First Amendment

A major focus of the Supreme Court's constitutional analysis over the last few years, the First Amendment, reappeared in 1985 and 1986 in a number of cases involving schools. You heard yesterday a discussion of Bethel School District No. 403 v. Fraser.(1) The facts in that case undoubtedly helped the Supreme Court to frame the very practical result.

Damages

However, another first amendment case decided last term did not have such favorable facts. Nevertheless, notwithstanding the old adage that "bad facts make bad law," the Supreme Court entered an excellent decision for school boards in the case of Memphis Community Schools v. Stachura.(2) In this case, where a teacher filed an action asserting First Amendment and Due Process claims against the superintendent, the school board and the school board members individually of the Memphis, Michigan schools, the Court further clarified the limits of a school board's § 1983 liability for constitutional violations.

The case arose out of complaints by parents about the teaching methods and materials used by a teacher in the sex education portion of a seventh grade life-science class. After an uproarious, open school board meeting in which the teacher was not present, the board suspended the teacher with pay without any type of administrative hearing. As a result of the statements made by the parents, several local news stories contained allegations that the teacher had been labeled a "sex maniac" and news accounts also appeared in national publications. It was later shown that the teacher's textbooks, films and lesson plans had been used for several years and had been approved by parents, the school board and the principal in advance of their use.

Before being reinstated the next fall, the teacher brought suit seeking compensatory and punitive damages under 42 U.S.C. § 1983 for constitutional deprivation of First and Fourteenth Amendment rights.

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EA 019 430

After the trial, the district court's instructions authorized two distinct types of compensatory damages: one for actual harm to the teacher, and another based on the "value" of "any Constitutional right" and "the importance of the right in our system of government, the role which this right has played in the history of our republic, [and] the significance of the right in the context of the activities which the Plaintiff was engaged in at the time of the violation of the right."(3)

The jury returned a verdict against the school board in the amount of $233,750 for total compensatory damages; against both the board president and the superintendent in the amount of $8,250 compensatory and $15,000 in punitive damages; and against each of the other board members in the amount of $2,750 compensatory and $1,000 punitive. The court of appeals affirmed the district court's damage award and upheld the instruction authorizing damages for the deprivation of "any Constitutional right" because "there was ample proof of actual injury to plaintiff Stachura".(4)

The Supreme Court, in reviewing the compensatory damage instruction issue, agreed with the school board's characterization of the jury instructions as permitting "the jury to award damages based on its own unguided estimation of the value of such rights."(5) Justice Powell, with frequent references to Carey v. Piphus,(6) restated the basic purpose of § 1983 damages as governed by common law tort principles: "to compensate persons for injuries that are caused by the deprivation of constitutional rights."(7)

The Court repeatedly asserted that "the abstract value of a constitutional right may not form the basis for § 1983 damages".(8) In striking down the instruction, therefore, the Court found an improper focus upon "the jury's subjective perception of the importance of constitutional rights as an abstract matter".(9) The Court made clear that the challenged instructions "do not authorize compensation for injury" and "only that damages based on the 'value' or 'importance' of constitutional rights are not authorized by § 1983, because they are not truly compensatory".(10)

In reflecting upon this case, the importance of school boards following a fair and reasonable process in deliberating matters involving moral turpitude cannot be overemphasized. Juries and lower courts are particularly vulnerable to a common sense doctrine of "fairness" and, if it appears that the school board is acting oppressively toward a student or employee, often the school board will lose even if there is no technical constitutional wrong. As Justice Blackmun pointed out during oral argument, juries are likely to consider the "intrinsic worth" of constitutional rights even in absence of an instruction.

Certainly one has to sympathize with boards who, on the one hand, must deal with this type of hysterical behavior by parents, but, on the other, must assure that the students are protected in the event that the allegations are correct. In this case, however, the damage suffered by the teacher was a result of the publicity subsequent to

his suspension. While the board had the power to assist the teacher, he was left "swinging in the wind" until they ultimately decided the allegations were unfounded. This case presents a good example of the effects of allowing an issue to fester before taking concrete action to remediate. Fortunately, the Supreme Court was not swayed by these unfortunate facts and decided the case on the legal merits of actual injury as the basis for awarding § 1983 compensatory damages.

Handicapped

The Court has agreed to hear a case brought under the Education for All Handicapped Children Act on a subject which is very important to school boards - discipline of handicapped children. The case is Honig v. Doe.(11)

The suit was brought against the San Francisco Unified School District and the California Superintendent of Education on behalf of two handicapped students, who are emotionally disturbed with aggressive tendencies. One student, known as John Doe, was discharged from a state mental hospital, an individualized education plan (IEP) was prepared for him by the district and he was admitted to a regular school. Upon admission he assaulted another student and broke a school window and was suspended for 5 days. The principal informed his mother and their attorney that he was recommending expulsion. Before the expulsion proceedings were completed, the mother sued. The court ordered the district to admit the child while efforts were being made to find him an alternative placement.

The second child, Jack Smith, was admitted to a regular school on a half-time basis after he became disruptive while enrolled full time. He engaged in repeated acts of theft, extortion, and sexual advances to female students and was suspended. He was eventually placed in a private school. No recommendation was made for expulsion.

The claim against the state department of education and superintendent of education was based on their alleged failure to establish a policy regarding discipline of handicapped students and to monitor compliance by the local district.

The district court held against both the state and the local district. Both appealed to the 9th Circuit Court of Appeals which, in a long and complex opinion, decided that the California Education Code, followed by the district, violated the Education for All Handicapped Children Act (EAHCA) because the discipline provisions failed to take account of the requirements of the EAHCA relating to change of placement. The court held that if the behavior for which a handicapped child is disciplined is a "manifestation of the handicap," the child may not be expelled from school. While the child's placement may be changed because he poses a danger to himself or others, that change may not be initiated without compliance with the full panoply of procedural requirements in the EAHCA. The court ruled that under the so-called "stay-put"

provision of the EAHCA, the child must remain in the current placement until the completion of the review proceedings. The court also directed the state to develop guidelines and to provide services directly to the handicapped children which the local district has failed to serve.

The state petitioned the Supreme Court to review the case. The petition was granted on both the issue of the "stay-put" provision and the issue relating to the duty of the state to provide services directly.

Section 1983

In 1980 the Supreme Court ruled in the case of Maine v. Thiboutot,(12) that an action under 42 U.S.C. Section 1983 will lie to enforce violations of federal statutes by agents of the State. This term the Court, in a 5-4 decision, has extended that ruling to include violations of federal agency regulations.

The case Wright v. City of Roanoke, (13) was brought by tenants of a low-income housing project alleging that the City of Roanoke Redevelopment and Housing Authority violated the rent ceiling imposed by the Housing Act of 1937 and the implementing regulations of the Department of Housing and Urban Development (HUD) by imposing a "surcharge" on the tenants for "excess" utility consumption. Both the district court and the 4th Circuit Court of Appeals held that a private right of action was unavailable. The Court of Appeals held that while certain "rights" were conferred on tenants, they could only be enforced by HUD, not by the individual tenant.

The majority distinguished Pennhurst State School and Hospital v. Halderman, (14) Middlesex County Sewerage Authority v. National Sea Clammers Assn., (15) and Smith v. Robinson, (16) on the ground that they fall within exceptions to the general rule of Thiboutot; exceptions which the Court held did not apply here. The first exception arises where Congress did not create enforceable rights, privileges, or immunities within the meaning of Section 1983 (Pennhurst) and the second arises where Congress has foreclosed individual enforcement of the statute in the enactment itself (citing the comprehensive enforcement schemes at issue in Sea Clammers and Smith).

The Act in question imposed a ceiling on rents, based on a percentage of the family's income. The majority opinion by Justice White found that HUD regulations had "consistently considered 'rent' to include a reasonable amount for the use of utilities," although the dissenting opinion by Justice O'Connor (in which the Chief Justice and Justices Powell and Rehnquist joined) pointed out that over the years HUD frequently changed its views on how best to administer the provision of utilities to public housing tenants. Thus, the Court disagreed with respondents that the provision for a "reasonable" allowance is "too vague and amorphous" to confer an enforceable "right." The Court also refused to find an enforcement scheme in the law which would preclude individual enforcement of the

"rights."

Justice O'Connor's dissent cites three questions which she believes must be answered before a federally enforceable "right" can be deliniated. (17) "First, whether the Act itself has created an enforceable right to utilities. Second, whether in absence of any indication of congressional intent to create a right to utilities, administrative regulations can create such a right. The third is whether, assuming administrative regulations alone could create a right enforceable in a Section 1983 action, the regulations at issue in this case have established standards capable of judicial interpretation and application."

Justice O'Connor notes that the majority based its finding of Congressional intent to create a right to reasonable utilities on HUD's interpretation of the Act. She expressed concern that "lurking behind the Court's analysis may be the view that, once it has been found that a statute creates some enforceable right, any regulation adopted within the purview of the statute creates rights enforceable in federal courts, regardless of whether Congress or the promulgating agency ever contemplated such a result." Hopefully, Justice O'Connor's prediction will prove false.

Section 1988 Attorneys Fees

In City of Riverside v. Rivera,(18) the Supreme Court affirmed an appeals court ruling that respondents should receive reasonable attorney's fees for their civil rights case under 42 U.S.C.§ 1988, even though the award for fees exceeded the amount of damages awarded.

A number of police officers from Riverside's police force broke up a party, given by two respondents and attended by eight others, with tear gas and physical force. The officers acted without probable cause, without a warrant and proceeded to arrest four of the respondents together with other guests. The district court later ordered that the charges be dropped.

Respondents brought suit against the city of Riverside and others under 42 U.S.C. §§ 1981, 1983, 1985(3) and 1986 for violations of their First, Fourth and Fourteenth Amendment rights. The jury returned 37 individual verdicts for the respondents and awarded them $33,350 in damages. The respondents requested attorney's fees under 42 U.S.C. § 1988. The district court found that the hours and rates sought were reasonable and awarded the respondents $245,456.25 in attorney's fees. The Ninth Circuit affirmed on appeal of petitioners. Petitioners then sought and were granted certiorari to the Supreme Court. The Court vacated the court of appeals judgment and remanded the case for reconsideration in light of Hensley v. Eckerhart.(19) The district court reconsidered the case and again concluded that respondents were entitled to the $245,456.25 in attorney's fees. Again, the circuit court affirmed the district court's findings.

In affirming the court of appeals decision, the Supreme Court analyzed the rationale behind 42 U.S.C. § 1988. This act authorizes the district courts to award reasonable attorney's fees to parties prevailing in certain civil rights litigation. The Court reasoned that Congress' intent in passing the law was to create an exception to the Alyeska "American Rule" for civil rights cases in which some plaintiffs may not be able to afford competent counsel to preserve their civil rights. (20) The Court cited Newman v. Piggie Park Enterprises, Inc., (21) for the proposition that a plaintiff who seeks relief in a civil rights case is doing so for himself as well as others in his position. Hence, such a plaintiff should not be denied his day in court for lack of funds.

The Court relied on its earlier decision in Hensley v. Eckerhart where guidelines were set for calculating reasonable attorney's fees under § 1988. The Court rejected petitioners' contention that respondent's attorney should not receive compensation for hours expended on related litigation. In reaching this conclusion, the Court quoted Hensley by saying that the lawsuit could not be "viewed as a series of discrete claims", rather "as a common core of facts" or "legal theories".(22)

The Court also rejected petitioners' contention that fees should not be awarded in excess of the damages award. The Court reasoned that such a rule would undermine Congress' intent in enacting § 1988. This would happen because competent lawyers would not be attracted to low paying civil rights cases.

The Court, after analyzing the results of counsel's work, found that if a private sector contingency fee system were used, or if attorney's fees were limited to an amount proportionate to damages awarded, then counsel could not have devoted the time which the case required.

In another § 1988 case, Evans v. Jeff D., (23) the Supreme Court ruled that a district court is not prohibited by 42 U.S.C. § 1988 from approving a proposed settlement in a civil rights class action case which offers relief that is conditioned upon the waiver of attorney's fees.

Respondents brought a class action against petitioners in federal district court on behalf of children who have been or will be placed in petitioners' care. They alleged that deficiencies in educational and health care services violated the federal and state constitution and various federal and state statutes. Injunctive relief, costs and attorney's fees were sought. The district court approved a settlement granting the injunctive relief but conditioned upon respondents' waiver of any claim of attorney's fees. The court of appeals invalidated the fee waiver, left the rest of the agreement intact, and remanded to the district court for a determination of a reasonable fee.

In reversing the court of appeals, the Supreme Court found the issue to be whether the district court had a duty to reject the settlement

because of its waiver clause even when the settlement offered is equal to or greater than that which plaintiffs could reasonably expect to achieve at trial. The Court interpreted the language of § 1988 as creating an eligibility for attorney's fees for the plaintiff and did not find that the Act prevents waiver of this eligibility or assignment of this right to an attorney. Hence, the Court concluded that it is not necessary to interpret § 1988 as a rule prohibiting settlements with fee waiver conditions in order to be faithful to the intentions of the Act.

A second question analyzed by the Supreme Court was whether the district court abused its discretion by approving a settlement which included a fee waiver. In noting that Fed. R. Civ. P. 23(e) requires that a court approve the terms of any settlement of a class action before it can become effective, the Court rejected the contention § 1988 would disallow approval of an attorney fee waiver. No language in the Act stipulates that the award of attorney's fees is a requirement, especially when the respondents are not directly challenging the waiver. Thus, the Act is simply another remedy available to the respondents. The Court concluded that the district court did not abuse its discretion and also found that the district court was correct in finding that the acceptance of the settlement did not breach any ethical duty on the part of respondent's counsel.

A case which could be helpful in defending against claims brought under the new Handicapped Children's Protection Act (amending the Education for Handicapped Children Act) is North Carolina Department of Transportation v. Crest Street Community Council, Inc. (24) Respondent, the Crest Street Community Council, represents residents of a community in Durham which was contesting the proposed location of a highway. Respondents filed a complaint with the U.S. Department of Transportation (DOT) alleging that Petitioners violated Title VI of the Civil Rights Act of 1964 and requesting that the planning and construction of the proposed highway be halted. Title VI prohibits discrimination on the basis of race, color or national origin by federally assisted programs and activities.

DOT entered a preliminary judgment that Petitioners were in prima facie violation of Title VI and urged them to negotiate a resolution. Ultimately, the matter was resolved through negotiation with respondents and with the plaintiffs in an unrelated lawsuit complaining of the environmental impact of the proposed highway. Respondents filed suit seeking attorneys' fees under 42 U.S.C. § 1988. The court of appeals ruled that fees were awardable through an independent action "solely to recover fees for an administrative complaint that has already been settled." The High Court, in a 6-3 decision by Justice O'Connor, reversed.

The Court interpreted the provision in 42 U.S.C.§ 1988 which authorizes "the court, in its discretion" to award attorneys' fees "in any action or proceeding to enforce a provision of...Title VI of the Civil Rights Act..." to be operative only when the proceeding is

brought to enforce Title VI or other statutes listed in the Act. "[A]n award of attorney's fees under § 1988 depends not only on the results obtained, but also on what actions were needed to achieve those results. It is entirely reasonable to limit the award of attorneys's fees to those parties who, in order to obtain relief, found it necessary to file a complaint in court."

The Court disagreed with the dissent's contention that lawyers will file suit, without going through administrative proceedings, merely in order to assure attorneys' fees. The majority also noted that the holding "creates a legitimate incentive for potential civil rights defendants to resolve disputes expeditiously, rather than risk liability for attorneys fees.

Title VII

Sexual Harassment

Meritor Savings Bank v. Vinson (25) presented to the Court for the first time the question of employer liability for "sexual harrassment" of an employee by another employee. The complainant, Michelle Vinson, began work for the defendant bank as a teller-trainee. She was hired and supervised by a vice president of the bank who managed the branch where Vinson worked for four years, finally being promoted to the position of assistant branch manager. Apparently there was no dispute that her advancement was achieved on merit alone. At the end of the four years, and after filing the sex discrimination complaint, Vinson took indefinite sick leave, and was discharged two months later for excessive use of that leave.

She brought this action charging her supervisor with sexually harrassing her over a 2-1/2 year period, even to the extent of assaulting and raping her. She attempted to bring in evidence of unwanted touching of other female employees by the supervisor, but the district court refused to allow that evidence, although apparently the trial court did hear some of the evidence.

The district court ruled in favor of the employer and the supervisor on several grounds:

First, the district court held that because Vinson was not required by her employer to grant sexual favors to her supervisor, the employer was not liable for the supervisor's actions. The actions of the employee were, in effect, voluntary. The D.C. Circuit disagreed, stating that an employer can be held liable for pervasive on-the-job sexual harassment by a superior, without evidence of adverse action or threatened adverse action against the female employee. Under the D.C. Circuit opinion, the employee need not prove resistance to the sexual overtures.

Second, the circuit overturned the lower court's ruling as to testimony of other employees. The court held that even a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere in which such

harassment was pervasive.

Finally, as to the question of whether Title VII requires that the employer have notice of the conduct of its supervisors before liability for sexual harrassment can be imposed, the court answered no. While agreeing that the doctrine of respondeat superior does not apply in Title VII cases, the court held, nevertheless, that Title VII imposes an affirmative duty on employers to "take a more active role in warranting to each employee that he or she will enjoy a working environment free from illegal sex discrimination."

The employer requested en banc review of the court of appeals decision. Although the court denied this request, several of the circuit judges, including Justice Scalia then sitting on the court of appeals, lodged a dissent stating that they would have granted the rehearing en banc. Cited as one of his anti-plaintiff stances in Title VII cases, Justice Scalia disagreed with the holdings of the original circuit court panel. These dissenting arguments supporting the admissibility of plaintiff's sexually provocative speech and dress and rejecting automatic liability of the employer for the sexual misconduct of its supervisors were later espoused by Chief Justice Rehnquist in the Supreme Court's majority opinion.

The Supreme Court, agreeing with the court of appeals that the plaintiff need not allege economic loss in order to sustain a Title VII action, ruled that Title VII also bars sexual harassment that creates a hostile working environment regardless of any economic loss. The Court said that in order to be actionable the harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" In the Court's view, Vinson's allegations including pervasive harassment and charges of rape are "plainly sufficient to state a claim for 'hostile environment' sexual harassment."(26)

The Court also agreed that an employee's voluntary submission to a supervisor's sexual demands is not a defense to a Title VII sexual harassment suit. The Court said "[t]he correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."(27) In this regard the Court said that evidence about the complainant's sexually provocative speech and dress would be relevant to determining whether or not the employee welcomed the sexual advances of a supervisor.

On the issue of employer liability, the High Court ruled that the court of appeals erred in holding that employers are always automatically liable for sexual harassment by their supervisory employees. The Court similarly rejected the employer's view that the availability of a grievance procedure which the employee failed to use and the existence of a policy against such discrimination necessarily insulated the employer from liability. While declining to set out a definitive rule, the Court advised courts to look to agency principles for guidance on this issue. Four dissenters

departed from the Court's opinion on this issue in favor of a rule that holds that "sexual harassment by a supervisor of an employee under his supervision leading to a discriminatory work environment, should be imputed to the employer for Title VII purposes regardless of whether the employee gave 'notice' of the offense." (28)

Pre-Title VII Race Discrimination

In another Title VII case, involving racial discrimination in the form of disparate salaries paid to black and white employees, the Supreme Court held that the offending state agency must eliminate the salary disparities that originated prior to the date that Title VII became applicable to public employers. Bazemore v. Friday.(29) In a unanimous concurrence to the per curiam opinion, the Court expressly held that "[a] pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, he is liable under that statute." (30)

On a separate issue, the Court split 5-4 as to whether the state agency violated the Constitution by continuing to allow the operation of segregated 4-H and Homemaker Clubs. Five justices found no violation because the one race clubs occurred by the voluntary choice of the members. Distinguishing this situation from Green v. School Board of New Kent County,(31) where voluntary choice programs in public schools were held constitutionally inadequate to satisfy integration mandates, the Court pointed out that while school attendance is compelled and controlled by state created enrollment areas, there is no state compulsion to join 4-H or Homemaker Clubs, nor state authority to deny a person the right to join any club of his or her choosing. The four dissenters disagreed, citing the state agency's history of administering a segregated system of clubs as de jure segregation requiring affirmative action to desegregate. The dissenters labelled the Court's distinctions of this case from Green "irrelevant", stating that nothing in the Court's previous opinions suggested that the "state's obligation to desegregate is confined only to those activities in which members of the public are compelled to participate."

"Reasonable accommodation" for religious beliefs

In an 8-1 decision, the Supreme Court has ruled in the case of Ansonia Board of Education v. Philbrook, (32) that an employer need not accommodate an employee's religious beliefs by accepting the accommodation preferred by the employee. Rather, an employer need only offer "a reasonable accommodation" to meet its obligation under Title VII of the Civil Rights Act.

The collective bargaining agreement between the Ansonia, Connecticut Board of Education and the Ansonia Federation of Teachers provides three days of leave for observance of religious holidays, as well as

three days of leave for "necessary personal business." The contract, however, prohibits a teacher from using the "personal" leave for a purpose already provided for in the contract, such as the observance of religious holidays.

Ronald Philbrook is a member of the Worldwide Church of God, the tenets of which require members to refrain from secular employment during designated holy days, six of which fall on school days. Originally Philbrook took unauthorized (and unpaid) leave for religious holidays beyond those allowed in the contract but later he requested the Board to permit him either to use his personal leave for that purpose or to pay the cost of a substitute and receive full pay for additional days off for religious observances.

Title VII requires employers to "reasonably accommodate to an employee's religious observance or practice without undue hardship on the conduct of the employer's business." The Second Circuit Court of Appeals ruled that where the employer and employee each propose a reasonable accommodation, Title VII requires the employer to accept the employee's proposal unless the accommodation causes "undue hardship."

The Supreme Court refused to adopt that standard, holding that "where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end...The extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation witout such hardship."

The Court remanded the case back to the District Court to make additional findings on the issue of personal business leave. Respondents had argued that such leave was not a limited purpose leave, as contended by the school board, but instead operated as an open-ended leave provision to be used for a wide range of secular purposes but not for similar religious purposes. The Court noted that "unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes except religious ones." Justices Marshall concurred on the question relating to discriminatory leave provisions but dissented on the first issue. Justice Stevens agreed that the Court of Appeals reasoning was incorrect but dissented from the order of remand.

Affirmative Action

The Supreme Court issued last term three decisions regarding affirmative action in employment, two decided under Title VII and one under the Equal Protection Clause.

One of these cases, Wygant v. Jackson Board of Education, (33) directly involved a school board that entered into a collective bargaining agreement with a teachers union, one of the provisions of which stated that in the event of a layoff, the board would retain those teachers with the most seniority except that the percentage of minority personnel discharged could not exceed the percentage of

minorities employed at the time of the layoff. In 1974 when the board failed to comply with the provision, the union along with two minority employees who had been laid off brought suit charging the board with violations of Title VII and the Equal Protection Clause of the Fourteenth Amendment. When the federal district court concluded that it lacked jurisdiction to decide the claims, the plaintiffs brought essentially the same claims in state court. The state court approved the provision despite its adverse effect on white teachers and rejected the board's argument that the provision itself violated the Civil Rights Act of 1964.

After the state court ruling, the school board followed the collective bargaining layoff scheme in future years. This caused the layoff of some nonminority teachers who had more seniority than some of the minority teachers retained by the board. The affected nonminority teachers, charging violations of the Equal Protection Clause, Title VII, 42 U.S.C. § 1983 and other federal and state statutes, brought suit in federal court. The district court ruled in the board's favor, dismissing all the claims of the disgruntled teachers. With respect to the Equal Protection Clause claim, the district court approved the racial preference as an attempt to remedy societal discrimination by providing role models for minority schoolchildren. The court of appeals affirmed.

The Supreme Court, reversing the lower courts, decreed that societal discrimination alone cannot justify any racial classification adopted by a public employer. The Court also shunned the role model theory as an adequate justification for the affirmative action plan limiting the layoff of minority teachers. The Court said "the role model theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices," (34) and in fact, if taken to the extreme could be used to justify limiting the number of black teachers employed by the school. Justice O'Connor, in a concurrring opinion, did indicate, however, that "the very different goal of promoting racial diversity among the faculty" might be an appropriate objective.

The Court acknowledged that "race-conscious remedial action may be necessary" (35) to eliminate racial discrimination from the schools, but it admonished school boards contemplating a voluntary affirmative action program to ensure that "it has convincing evidence that remedial action is warranted," i.e., "sufficient evidence to justify the conclusion that there has been prior discrimination." (36) The Court pointed to the fact in this case that the lower courts that reviewed the validity of the layoff provision had concluded that statistical disparities in the number of minorities employed by the school board in the past resulted from general societal discrimination, not from the board's own discriminatory practices.

Justice O'Connor, in a concurring opinion, clarified that the Court did not mean that a public employer must await a judicial finding of discrimination before establishing an affirmative action program. Justice O'Connor extolled the value of voluntary compliance by a

public employer in elimination of racial discrimination, but she too instructed that the employer "must have a firm basis for determining that affirmative action is necessary." (37) O'Connor stated that in this case, she would not invalidate the layoff provision simply because no particularized finding of discrimination had been made but because the provision was not "narrowly tailored" to achieve its asserted remedial purpose. She said the layoff scheme was keyed to a hiring goal, achieving the same percentage of minority faculty as minority student enrollment, that has no relationship to the remedying of employment discrimination.

O'Connor's conclusion that the layoff provision was not "narrowly tailored" to the asserted remedial purpose echoed the Court's findings, but her reasoning was much less extreme than that of Justice Powell who announced the judgment of the Court. While Powell acknowledged that "innocent persons may be called upon to bear some of the burden" necessary to remedy the effects of prior discrimination, he suggested that the burden should be diffused among society generally through hiring goals. He called layoffs "too intrusive" because particular individuals must bear "the entire burden of achieving racial equality" which often results in "serious disruption of their lives." (38) While not directly foreclosing all possibility that any layoff plan could satisfy the "narrowly tailored" test, Powell said the plan at issue in this case violated the Equal Protection Clause because less intrusive means, such as hiring goals, existed to accomplish purposes that may otherwise be legitimate.

Justice Marshall, in a vigorous dissent, said that if the Court had "genuinely consider[ed] the circumstances of the provision at issue" in this case, the provision would have passed constitutional muster. (39) Marshall asserted that in fact adequate evidentiary support did exist for the remedial action taken. Although the lower courts did not consider this evidence, Marshall felt that Powell should have remanded the case for such factfinding.

In assessing the means chosen to achieve the state purpose, Marshall called Powell's position "untenable" since "[a]s a matter of logic as well as fact a hiring policy achieves no purpose at all if it is eviscerated by layoffs." (40) Furthermore, Marshall viewed the layoff plan as a "narrow provision" because "it allocates the impact of an unavoidable burden proportionately between two racial groups." He challenged the rest of the Court to propose an alternative that would achieve the stated goal in "any narrower or more equitable fashion." (41)

The Wygant decision no doubt will cause school boards to be leery of establishing voluntary affirmative action plans unless the discriminatory practices of the school board have been previously established or there exists substantial evidence to support such a finding. One lesson that school boards should take from the Wygant case is to ensure that whatever evidence they have to support a particular race conscious remedial plan is properly presented to the trial court, should the plan ever be challenged. The Wygant

decision will also certainly encourage school boards contemplating a change in a strict seniority layoff scheme to think twice before doing so. Although Justice Powell strongly objected to the use of race-conscious layoff plans as a means of remedying prior employment discrimination, Justice O'Connor indicated that such plans might be able to satisfy constitutional standards if they are linked to hiring goals that seek to increase the percentage of minority employees to the same percentage of minorities in the relevant labor pool. Justice Marshall's strong dissent added support to this view when he argued that minority hiring goals can become meaningless if layoffs proceed on a strict seniority basis. One thing is clear, the Supreme Court did not make it easier for school boards to understand the parameters of permissible affirmative action.

The other two affirmative action cases involved the scope of remedies that a court may order under Title VII of the 1964 Civil Rights Act. In the first case, Local No. 93 v. City of Cleveland, (42) the Supreme Court affirmed 6-3 the lower court's approval of a consent decree (entered without the intervenor-union's consent) which provides for the use of race-conscious relief in promoting firefighters. In a narrow holding, the Court said the remedial authority of a court under § 706(g) of Title VII which precludes imposing certain forms of race conscious relief is not applicable to voluntary agreements that may benefit persons who are not actual victims of discrimination. The Court so held while recognizing that "a court might be barred from ordering the same relief after trial or, as in Firefighters v. Stotts, (43) in disputed proceedings to modify a decree entered upon consent." The Court acknowledged that "the consent decree does not purport to resolve any claims that it violates the general anti-discrimination provision of Title VII or the fourteenth amendment," claims it left for the district court to resolve.

In its other decision, Local No. 28 v. EEOC, (44) the Court again upheld race-conscious affirmative action under certain circumstances. Six Justices, including one dissenter, held that courts may in some cases grant preferential relief to persons who are not actual victims of unlawful discrimination. In this case, the Court upheld a court-ordered affirmative action plan which consisted of a 29.23% non-white membership goal and a fund to increase the pool of qualified non-white applicants for the apprenticeship program through training, counseling and tutorials. The Court also approved the district court's use of statistical data based on the relevant labor pool for establishing the 29.23% goal, contempt fines and the fund as remedies for civil contempt and an administrator to supervise the union's membership operations. The dissenters characterized the membership goal as a "rigid racial quota," unreachable by good faith efforts of the union and found it to be a violation of Title VII.

Separation of Powers

In Bowsher v. Synar, (45) the Supreme Court decided on

separation of powers principles the constitutionality of certain parts of the Balanced Budget and Emergency Deficit Control Act of 1985 (commonly known as the Gramm-Rudman-Hollings Act).

The Act, designed to eliminate the federal deficit by 1991, sets a target "maximum deficit amount" for each year beginning in 1986. If the target is not met through the traditional budget and appropriation process, the Act provides for a so-called "sequestration" process. Under that process the Directors of the Office of Management and Budget (OMB) and the Government Accounting Office (GAO) each calculate first, the amount by which the deficit exceeds the target and second, the budget reductions necessary to meet the target.

Their reports are then submitted to the Comptroller General who issues his own report. That report forms the basis for a Presidential "sequestration order," which makes the budget cuts. The first sequestration order, for fiscal year 1986, was issued by the President on February 1. It resulted in a cut in education funding of 4.3%.

Shortly after passage of the Act on December 12, 1985, two suits were filed in the U.S. District Court for the District of Columbia. The suits were consolidated and heard by a three-judge panel in January. One suit, brought by members of the Congress, challenged the provision requiring the President to "sequester" funds. Plaintiffs argued that such power is legislative and cannot be delegated to the Executive Branch. The other suit by members of the National Treasury Employees Union also disputed the sequestration process, in particular the order which reduces their cost-of-living increases. The suits also challenged, as an unconstitutional delegation of executive power, the conferring of powers to the Comptroller General. The Department of Justice joined the challenge as to the Comptroller General, but supported the constitutionality of the remainder of the Act.

In a unanimous per curiam decision, a three-judge panel of the court, which included then Justice Scalia, then sitting on the court of appeals, ruled against the plaintiffs on the question of the authority of the President to sequester funds. Disagreeing that Congress had "declined to make the hard choices," the court opined that Congress "has established an intricate administrative mechanism to address [the] goal [of deficit reduction by 1991] and it has specified in meticulous detail which program budgets will be reduced in order to achieve that result, and by how much."

The court declared the President's February sequestration order unconstitutional because it was based on the Comptroller General report. The powers conferred to the Comptroller General are executive powers, which cannot be exercised by an officer removable by Congress. The court noted that Congress had included in the Act a "fallback" clause, to be operative in the event of a finding of unconstitutionality. Under that provision the OMB-GAO Report would be transmitted to a special committee of Congress, instead of to the Comptroller General, ultimately to be passed by both Houses and

presented to the President for signature or veto. That process, in the opinion of the panel, passes constitutional muster.

On appeal the Supreme Court affirmed the district court decision that the powers accorded the Comptroller General violate the constitutional separation of powers principle that Congress take no direct role in the execution of the laws. The Court reached this conclusion based on its belief that the Comptroller General is an officer of the Legislative Branch and therefore cannot be entrusted with any executive powers. The key factor that the Court used to support its reasoning lies in the removal powers that Congress kept to itself in the statute defining the Comptroller General's office. The Comptroller can only be removed from office by impeachment or by a joint resolution of Congress. He may be removed for "inefficiency," "neglect of duty," or "malfeasance," terms the Court considered broad enough to allow removal "for any number of actual or perceived transgressions of the legislative will." (46) The Court also pointed to the fact that Congress referred to the Comptroller General as an officer of the Legislative Branch in subsequent legislation and that past Comptrollers had described themselves as members of the Legislative Branch in their public statements.

The Court had no trouble in determining that the powers vested in the Comptroller under the Act are executive. The Court said that the power to exercise independent judgment and evaluation with respect to the estimates and reductions submitted to him by the GAO and the OMB "plainly entail execution of the law in constitutional terms." This function called upon the Comptroller to "interpret the provisions of the Act to determine precisely what budgetary calculations are required," a function the Court considered the "very essence of 'execution' of the law." The provisions also gave the Comptroller "ultimate authority to determine the budget cuts to be made" and in fact to "command" the President to implement the Comptroller's budget reduction directive without variance. (47) The Court said that by placing such responsibilities in the hands of the Comptroller, the Congress had in effect "retained control over the Act and ... intruded into the executive function." (48)

The Court chose to strike down the provision rather than to recast the Comptroller as an executive officer by eliminating the congressional power to remove him. The Court felt comfortable in doing so on the basis of the "fallback" provisions which take effect upon invalidation of any of the Act's reporting procedures.

Justice White in his dissenting opinion disputed the majority's conclusion that the Comptroller is subject to the congressional will.

Miscellaneous

State School Lands Appropriations

In Papasan v. Allain, (49) the Supreme Court affirmed the court of appeals determination that the county school boards, superintendents and children would not be barred by the Eleventh Amendment from asserting an Equal Protection claim based upon the present disparities in the distribution of benefits from the state's school lands appropriations. While upholding the court of appeals' use of the San Antonio v. Rodriguez, (50) "rational relationship to a legitimate state purpose" standard of review to Equal Protection challenges to public school funding disparities, the Court rejected the use of Rodriguez as a means of "validating all disparities that might occur in a system similar to that approved" in Rodriguez. The question of whether the appropriation disparities present in this case bear a rational relationship to a legitimate state purpose was remanded. On a separate issue the Court held that the Eleventh Amendment did bar the petitioners' claim against state officials for maladministration of a federal school lands trust because any relief for such a claim would "in practical effect [be] indistinguishable in many aspects from an award of damages against the State."(51)

State Withdrawal from Social Security System

In Bowen v. Public Agencies Opposed to Social Security Entrapment, (52) the High Court found that the contractual arrangement to withdraw from the Social Security System entered into by the states, their public agencies and the federal government are not property within the meaning of the Fifth Amendment. Because Congress expressly reserved the authority to amend the provisions permitting such agreements, termination of the states' ability to withdraw is within Congress' reserved power. The Social Security contractual arrangement is subject to such termination without constituting a taking of property within the meaning of the Fifth Amendment.

Preclusive Effect of Administrative Agency Decisions

In University of Tennessee v. Elliott, (53) the Supreme Court affirmed the Sixth Circuit's holding that unreviewed state administrative agency decisions do not have a preclusive effect upon subsequent Title VII claims brought in federal court. However, the Court reversed the court of appeals' holding that state administrative proceedings never have a preclusive effect in subsequent actions brought in federal court under 42 U.S.C. § 1983. When a state administrative agency acting in a judicial capacity resolves disputed issues of fact which the parties have had an adequate opportunity to litigate, the Court held traditional rules of preclusion apply to subsequent § 1983 actions for reasons of federalism and judicial efficiency.

FOOTNOTES

1. S.Ct. 3159

2. 106 S.Ct. 2537 (1986).

3. Id. at 2541.

4. Stachura v. Truszkowski, 763 F.2d 211, 214 (6th Cir. 1985).

5. 106 S.Ct. at 2541.

6. 435 U.S. 247 (1978).

7. Id. at 254.

8. 106 S.Ct. at 2543.

9. Id.

10. Id. at 2544, n. 13.

11. Doe v Maher, 793 F.2d 1470 (9th Cir.1986), cert grnrd, sub nom Honig v Doe, 55 L.W. 1470 (Feb.24,1987).

12. 448 U.S. 1.

13. 55 L.W. 4119 (U.S. Jan. 13,1987).

14. 451 U.S.1 (1981).

15. 453 U.S.1 (1981).

16. 468 U.S.992 (1984).

17. 55 L.W. 4119,4123.

18. 106 S.Ct. 2686 (1986).

19. 461 U.S. 424 (1983).

20. Aleyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975).

21. 390 U.S. 400, 402 (1968).

22. 461 U.S. at 435.

23. 106 S.Ct. 1531 (1986).

24. 55 L. W. 4001 (U.S. Nov. 4, 1986).

25. 106 L.W. 2399 (1986).

26. Id. at 2406.

27. Id.

28. Id. at 2410 (Marshall, J., dissenting).

29. 106 S.Ct. 3000 (1986).

30. Id. at 3006.

31. 391 U.S. 430 (1968).

32. 55 L.W. 4019 (U.S. Nov 17, 1986).

33. 106 S.Ct. 1842 (1986).

34. Id. at 1847-48.

35. Id. at 1848.

36. Id.

37. Id. at 1856 (O'Connor, J., concurring).

38. Id. at 1851-52.

39. Id. at 1860 (Marshall, J., dissenting).

40. Id. at 1864.

41. Id. at 1865.

42. 106 S.Ct. 3063 (1986).

43. 467 U.S. 561 (1984).

44. 106 S.Ct. 3019 (1986).

45. 106 S.Ct. 3181 (1986).

46. Id. at 3190.

47. Id. at 3192.

48. Id. at 3193.

49. 106 S.Ct. 2932 (1986).

50. 411 U.S. 1.

51. 106 S.Ct. at 2942, citing Edelman v Jordan, 415 U.S. 651, 668.

52. 106 S.Ct. 2390 (1986).

53. 106 S.Ct. 3220 (1986).